

<b>BOARD OF APPEALS CASE NO. 5365</b>	*	<b>BEFORE THE</b>
<b>APPLICANT: Jeffrey Tidey</b>	*	<b>ZONING HEARING EXAMINER</b>
<b>REQUEST: Variance to allow an existing retaining wall, patio and shed within the recorded easement; 1240 Whispering Woods Way, Bel Air</b>	*	<b>OF HARFORD COUNTY</b>
	*	<b>Hearing Advertised</b>
	*	<b>Aegis: 6/27/03 &amp; 7/2/03</b>
<b>HEARING DATE: July 30, 2003</b>	*	<b>Record: 6/27/03 &amp; 7/4/03</b>

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### **ZONING HEARING EXAMINER'S DECISION**

The Applicant, Jeffrey Tidey, is requesting a variance, pursuant to Section 267-26C(6), of the Harford County Code, to allow an existing retaining wall, patio and shed within the recorded easement in an R3/COS District.

The subject parcel is located at 1240 Whispering Woods Way, Bel Air, Maryland 21014, in the Third Election District, and is more particularly identified on Tax Map 41, Grid 2A, Parcel 241, Lot 1, in the Hickory Overlook subdivision. The parcel contains approximately 0.32 acres.

The Applicant, appeared, and testified that he is the owner of the subject property. He indicated that he had read the Department of Planning and Zoning's Staff Report, and had no changes or corrections to the information contained therein. Mr. Tidey described his property as a corner lot with frontage on both Whispering Woods Way and Overlook Way. His home faces Whispering Woods Way.

The property is improved by an existing dwelling, which was constructed 13 feet behind the front setback on Whispering Woods Way. It is also improved by a frame shed located in the southwest corner of the lot, a slate and concrete patio, a wooden retaining wall which extends into the easement on the western side of the property line, a child's wooden swing set, and an in ground swimming pool. There is a recorded open space easement located outside of the fenced portion of Applicant's rear yard, between his property line and Lot 126. That area contains a mulched trail and landscaping. The Applicant testified that this trail was originally slated to lead to a child's play area; however, that plan was later voted down by the neighborhood homeowner's association.

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According to the witness, that the Department of Public Works has indicated there are no utilities located within any of the easements surrounding his property. That Department also informed him that there are no existing drainage problems caused by any of the improvements for which variances are being requested. Mr. Tidey further testified that none of his adjacent neighbors have any objection to the existing retaining wall, patio or shed. In support of this statement, he introduced four letters (Applicant's Exhibits 1A - 1D) originally submitted with his application and incorporated as Attachment 12 to the Department of Planning and Zoning's Staff Report. The first letter is from the property owner whose lot adjoins Applicant's property on Whispering Woods Way. The second is from the property owner whose lot adjoins the rear of Applicant's property, to the left of the existing shed. The third is from the property owners directly across the street from Applicant's property. The fourth letter is from the property owners adjoining Applicant's property on Overlook Way. Each letter indicates that the signing property owner has no problem with the location of the existing retaining wall, patio or shed.

The Applicant then described the site plan (Staff Report Attachment 2), which depicts the location of the existing home, retaining wall, patio, shed and in-ground pool. He indicated that all of the subject encroachments are shown on that site plan. The existing shed is located in the southwest rear of his property. A triangular portion of that structure extends 5 feet 4 inches into the easement. The shed does not have a permanent foundation. According to the Applicant, the shed is approximately 40 feet from the closest dwelling. The existing concrete patio extends 9 feet 6 inches into the utility easement, and is located a minimum of 35 feet from the closest dwelling. The retaining wall is located directly north of the patio and, likewise, extends 9 feet 6 inches into the utility easement and is 35 feet from the closest dwelling.

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In response to questions asked by the Hearing Examiner, the witness explained the presence on the site plan of a line of X's on the western side of his property. According to the witness, the zoning enforcement action which led to the subject request was precipitated by a complaint alleging that a deck was being constructed on his property without a permit. Mr. Tidey testified that he had not yet begun building the deck at that time, and that the building materials for the deck actually sat in storage on his property for over three months. The X's shown on the site plan depicted a line of lumber which he had placed in the ground to mark the proposed dimensions of the deck. The witness stated that there had previously been a fence constructed on that portion of his property, which was later determined to encroach into the open space behind his lot. Following that determination, 125 feet of fencing was torn down and moved out of the open space area. The Applicant was also required to relocate his electric box and pool heater to an area outside of the drainage and utility easement on the southern portion of his property.

Mr. Tidey next described several photographs, designated as Attachment 6, to the Department of Planning and Zoning's Staff Report. The top photo on the first page of that Attachment shows the 3 foot high retaining wall which encroaches into the drainage easement. The Applicant testified that because of the topography of his lot, it would be impossible to retain a level area in his rear yard if that retaining wall had to be removed. The second photograph on that page shows chairs next to the pool, located on the patio which is the subject of this request. The witness testified that this is the only level place near his pool where chairs can be placed. The area is too small to allow the chairs to be any further from the pool because they are now immediately adjacent to the existing fence. The bottom photograph on the first page of Attachment 6 depicts the existing shed. Mr. Tidey indicated that the shed cannot be moved closer to the in-ground pool without blocking the pool's concrete apron, nor can it be moved further to the southeast because of the existing electric box and pool heater.

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According to the witness, the existing location is the only place on his property where the shed can be positioned. It would not fit anywhere else in his rear yard because the area is too small. He also testified that if the shed could not remain in its current location, it would be very expensive to move, because it can only be moved by crane. He further stated that he needs the shed in order to provide a place for storage of pool chemicals, and toys for his children.

Finally, the Applicant testified that his home is located in the Hickory Overlook neighborhood, and that similar improvements have been made to other homes within his community. He also stated that the existing retaining wall, patio and shed are compatible with other property in the neighborhood, and that they have no adverse impact on adjacent properties.

The next witness to testify was Mr. Robert Ichniowski, who resides at 1239 Whispering Woods Way, directly across the street from the Applicant's property. Mr. Ichniowski, stated that he is the owner of one of the two original homes constructed in the Hickory Overlook neighborhood. According to the witness, the open space behind Applicant's property was originally designated for a trail leading to a community playground. This plan was voted down by the homeowner's association; therefore, the open space behind Applicant's property has no real current use. Mr. Ichniowski indicated that the Applicant currently maintains that area. He also testified that all of the improvements made to the Applicant's property have been tastefully built, and that they have no adverse impact on other homes in the community. The witness introduced Applicant's Exhibit 2, which is a letter from the Hickory Overlook Single Family Homeowner's Association. That letter indicates that the Association considered the Applicant's proposed variance regarding the encroachment of the existing shed into the open space, and that it had no objection to the subject request.

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Mr. Anthony McClune, Manager, Division of Land Use Management for the Department of Planning and Zoning, appeared and testified regarding the findings of fact and recommendations made by that Department. Mr. McClune stated that the Department recommended approval of the subject request in July 17, 2003 Staff Report. It found that the property is unique because it is a corner lot and is, therefore, subject to two front yard setbacks. The Applicant's home was constructed more than 13 feet behind the setback line for Overlook Way, reducing the buildable area of the rear yard. In addition, there are utility easements located on all four sides of the subject parcel, resulting in a much more restricted buildable area than that found on other properties in the neighborhood.

According to the witness, the Department of Public Works conducted an inspection of the site and determined that there are no utilities currently located within any of the easements surrounding Applicant's property. That Department determined that the existing improvements did not have to be removed at this time; however, if they are later found to contribute to drainage problems in the area, they will need to be removed at the owners expense. Mr. McClune also stated that the Department of Planning and Zoning had concluded that the existing improvements have no adverse impact on any neighboring properties.

No witnesses appeared in opposition to the requested variance.

## **CONCLUSION**

The Applicant, Jeffrey Tidey, is requesting a variance, pursuant to Section 267-26C(6), of the Harford County Code, to allow an existing retaining wall, patio and shed within the recorded easement in an R3/COS District.

Harford County Code Section 267-26(C)(6) states:

“Use limitations. In addition to the other requirements of this Part 1, an accessory use shall not be permitted unless it strictly complies with the following:

- (6) No accessory use or structure, except fences, shall be located within any recorded easement area.”

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Harford County Code Section 267-11 permits the granting of variances, stating:

“Variances from the provisions or requirements of this Code may be granted if the Board finds that:

- (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Code would result in practical difficulty or unreasonable hardship.
- (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Code or the public interest.”

The Maryland Court of Special Appeals set forth a two prong test for determining whether a variance should be granted in the case of Cromwell v. Ward, 102 Md. App. 691, (1995). This test can be summarized as follows. First, there must be a determination as to whether there is anything unique about the property for which the variance is being requested. A lot is unique if there is a finding that a peculiar characteristic or unusual circumstance relating only to the subject property, causes the zoning ordinance to impact more severely on that property than on surrounding properties. Cromwell, supra, at 721. If the subject property is found to be unique, the hearing examiner may proceed to the second prong of the test. This prong requires a determination as to whether literal enforcement of the zoning ordinance, with regard to the unique property, would result in practical difficulty or unreasonable hardship to the property owner.

The Hearing Examiner finds that the subject property is unique. The property is a corner lot and is hence subject to two front yard setbacks. The home was constructed over 13 feet behind the front setback for Overlook Way, and the property is surrounded on all four sides by utility and drainage easements. These factors reduce the buildable area in the rear yard. No other home within the Hickory Overlook community has such a restricted buildable rear yard area. Thus, the first prong of the Cromwell test has been met.

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Having found that the subject property is unique, it must next be determined whether denial of the requested variance would create an unreasonable hardship or practical difficulty for the Applicant. The Hearing Examiner finds that literal enforcement of the Code would result in both practical difficulty and unreasonable hardship in this case. Due to the topography of Applicant's lot, it would be impossible to retain a level area in his rear yard if the existing retaining wall were removed. The Applicant needs a level area in his rear yard so that his five children have a place to play outdoors. In addition, the existing shed would be extremely expensive to relocate as it would need to be moved by crane. There is no other location within the rear yard large enough to accommodate the shed. In addition, if the shed had to be removed from Applicant's lot, he would have no place to store pool chemicals and toys for his children. Finally, the existing patio is the only level area around Applicant's in-ground pool where chairs can be placed.

The Hearing Examiner finds that the granting of the requested variance will neither have any adverse impact to adjacent properties, nor materially impair the purpose of this Code or the public interest. The existing shed, retaining wall and patio are compatible with other improvements found within the Hickory Overlook neighborhood. The Applicant introduced letters from all adjoining property owners indicating that they have no objection to the granting of the requested variances. The only neighbor to testify at the hearing stated that the subject improvements have no adverse impact on other properties within the community.

The Hearing Examiner recommends approval of the Applicant's request, subject to the following conditions:

1. That the Applicant shall obtain all necessary permits and inspections for the existing shed, patio and retaining wall.
2. The Applicant shall be responsible for the cost of removal of the shed, patio and retaining wall if the Department of Public Works later determines that they are contributing to drainage problems in the area.

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3. That the Applicant not encroach further into the setbacks than the distances requested herein.

**Date        SEPTEMBER 10, 2003**

**Rebecca A. Bryant  
Zoning Hearing Examiner**